OAH 60-0325-30180

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Pat Walker,

Complainant,

v. **ORDER OF DISMISSAL**

Mark Freeburg,

Respondent.

On November 26, 2012, Pat Walker filed a Complaint with the Office of Administrative Hearings alleging that Mark Walker violated Minn. Stat. § 211B.06. The Complaint asserts that Mr. Freeburg prepared and disseminated false campaign material in connection with his re-election bid to the Anoka City Council.[1]

The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge on November 26, 2012, pursuant to Minn. Stat. § 211B.33. A copy of the Complaint and attachments were sent by e-mail and United States mail to the Respondent on November 26, 2012.

After reviewing the Complaint and attachments, the Administrative Law Judge finds that the Complaint does not state a *prima facie* violation of Minn. Stat. § 211B.06. Therefore, the Complaint is dismissed.

Based upon the Complaint, the supporting filings, and for the reasons set out in the attached Memorandum,

IT IS ORDERED:

That the Complaint filed by Pat Walker against Mark Freeburg is **DISMISSED.**

Dated: November 29, 2012

s/James E. LaFave
JAMES E. LAFAVE
Administrative Law Judge

[1] Mr. Freeburg won re-election to the Anoka City Council on November 6, 2012. He was the leading vote getter, collecting 3,831 votes. Mr. Walker was also a candidate for the Anoka City Council in the November 6, 2012, election. Mr. Walker finished third in the balloting. He was not elected.

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.69.

MEMORANDUM

The Complaint alleges that prior to the election Mr. Freeburg disseminated campaign material which prominently stated "No City Tax Increase for 2010-2011-2012-2013!!!"[2]

The Complaint asserts that this statement is false because the Anoka City Council approved two new tax increment financing districts in 2011, which Anoka County certified in 2012. The first district, known as the Greens of Anoka TIF, is budgeted to capture new revenue until 2040. The second district, known as the Commuter Rail Transit Village TIF, is also budgeted to capture revenue until 2040.

The Complaint argues that the Respondent intentionally prepared and disseminated false campaign material regarding the "No Tax Increase for 2010-2011-2012-1013!!!" claim to promote his candidacy, and that the Respondent knew it was false or did so with reckless disregard as to whether the statements were false.

A. Standards for Assessing False Literature Claims

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. The prohibition has two elements: (1) A person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person developing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false.

As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. The statute does not proscribe criticism of candidates that is merely unfair or uncharitable.[3] Indeed, this statute is set against the backdrop of the First Amendment; which assures Americans in the public square sufficient "breathing space" to assemble data, construct arguments and present conclusions to their fellow citizens.[4] The statute does not punish poor reasoning, but instead relies upon voters to discern the merits of arguments made in campaign brochures.

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[2] Ex. 1 Campaign flyer.

[3] *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

[4] *See, Boos v. Barry*, 485 U.S. 312, 322 (1988), ("[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment"); *State v. Machholz*, 574 N.W.2d 415, 422 (Minn. 1998) ("Commenting on matters of public concern is a classic form of speech that lies at the heart of the First Amendment, and

With respect to the second element of the statute the test is subjective: the Office of Administrative Hearings inquiries into whether the Respondent "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.[5]

B. Tax Increment Financing

Tax increment financing uses the increased property taxes that a new development generates to finance the costs of that development.[6] In Minnesota, tax increment financing is used for two basic purposes:[7] either to induce or cause a deployment or redevelopment that would otherwise not occur; alternatively, to finance public infrastructure such as streets, sewer or parking facilitates.[8]

C. Analysis

In this case, Mr. Walker apparently argues that because approval of a tax increment financing district results in an exemption from local property taxes for parcels within the district, such an action necessarily increases the tax burdens on other taxpayers.[9]

Even if this were true – and there is a good reasons to believe that creation of a tax increment financing district does not result in a change of either the tax rates or amount of tax levied onto other taxpayers[10] – at best, Mr. Walker has an argument as to what the phrase "no tax increases" means. Nevertheless, his reading of this phrase is not the only construction of those words; much less, what the average reader would understand Mr. Freeburg's claim to mean.

A claim in campaign literature that cannot be proven either true or false is not actionable under the Fair Campaign Practices Act.[11] Thus, even though Mr. Walker disagrees with Freeburg's characterization of certain City Council actions, Mr. Freeburg

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speech in public arenas is at its most protected on public sidewalks, a prototypical example of a traditional public forum") (citing *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997)).

[5] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski,* 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).

[6] *See,* Short Subjects: Tax Increment Financing (Minnesota House Research, October 2010).

[7] *Id.*

[8] *Id.*

[9] *See,* Complaint at p. 2.

[10] *See,* Short Subjects: Tax Increment Financing (Minnesota House Research, October 2010).

[11] *See, Hill v. Notch, et a.,*, OAH Docket No. 8-6326-17585-CV (2006)

(http://mn.gov/oah/multimedia/pdf/632617585_primafacie_ord.pdf).

is legally entitled to share that view with the public.[12] The cure for any shortcomings in the content and completeness of Mr. Freeburg's campaign literature is more speech by Mr. Walker and his supporters.[13]

The appropriate result is dismissal of the Complaint.

J. E. L.

[12] *See, Citizens United v. F.E.C.*, 130 S. Ct. 876, 898 (2010) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office"); *F.E.C. v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (The "First Amendment requires [tribunals] to err on the side of protecting political speech rather than suppressing it;" particularly in the context of campaigns for public office); *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

[13] *See, Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which "told only one side of the story," or were "unfair" or "unjust," without being demonstrably false, were not prohibited by the Fair Campaign Practices Act, and subject to cure by an incumbent who "was able to discuss and publicize his rebuttal to the charges made").